



DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA 95814-2922

MAR 17 1998



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901
March 17, 1998

Mr. Lester A. Snow, Executive Director
CALFED Bay-Delta Program
1416 Ninth Street, Suite 1155
Sacramento, California 95814

Dear Mr. Snow:

We are writing to identify concerns and to provide recommendations on the process by which conformity with the §404(b)(1) Guidelines (hereinafter "Guidelines") can be achieved for those program elements that will eventually need to obtain §404 permits during phase III of the CALFED program. Our intent is to streamline the process while at the same time ensuring that the supporting documentation is both adequate and satisfies the requirements of the Guidelines.

Our respective staffs have identified two strategies to address the Guidelines for Phase II of the CALFED program. These strategies are:

- a. To the extent permissible, make a determination as to conformity with the Guidelines for the selected programmatic alternative. This programmatic determination could then be incorporated into the record for permit decisions for individual projects in Phase III, as part of the basis for determining whether particular Phase III projects which require §404 permits comply with the Guidelines; or
- b. Publish a generally worded discussion in the Programmatic Environmental Impact Statement (PEIS) explaining the principles of the Guidelines and explaining how the USACE is guided by those principles when issuing the required permits. Moreover, the USACE would consider the PEIS to be an advance planning process for §404 purposes, to the extent that it reflects the general principles of the Guidelines. Pursuant to our NEPA responsibilities, the USACE would, during the development of the PEIS, comment on the degree to which the alternative screening process conforms to the Guidelines. We would provide guidance to

CALFED, commensurate with the level of decision-making at the conclusion of Phase II, regarding the adequacy of the range of activities to be included in Phase III as well as further documentation needed. This information would be entered in the environmental document and associated decision documents.

A detailed discussion of each strategy, identifying advantages, disadvantages, and risks, is provided at Enclosure 1.

The strategy articulated in subparagraph 2(b) (termed Option 2 in the Enclosure) is perceived by the USACE as the most flexible approach to the application of the Guidelines. This is because there is no administrative record created concerning the identification of a Least Environmentally Damaging Practicable Alternative (LEDPA) until an actual permit application is received. Therefore, should conditions change between the identification of the preferred alternative in Phase II and Phase III it is possible that the LEDPA could be refined to reflect these realities without having created the prior restraints caused by an early LEDPA determination on the programmatic alternatives.

Making a programmatic determination of conformity to the Guidelines offers greater assurance that individual projects consistent with the Phase II decisions will conform to the Guidelines. However, it should be clearly understood that the selection of the strategy outlined at subparagraph 2(a) will potentially limit the flexibility of the USACE to select the LEDPA during later phases of the CALFED program, should conditions necessitate the adoption of another alternative. In that event, there would be a considerable delay during the study and preparation of a supplemental administrative record which will be needed to explain the basis for departing from the previous conformity determination.

Our combined staff have developed an expanded outline of the process for determining the LEDPA called for in the Guidelines, presented at Enclosure 2, which should be followed if we pursue the strategy in subparagraph 2(a). This outline provides a further discussion of the alternatives evaluation contained in the Guidelines and a descriptive checklist of the substantive elements [of 40 CFR 230.10 sub-parts (b)-(d)] that must be complied with to demonstrate conformity in the context of the CALFED program.

The outline identifies areas of concern, with specific examples, where the program may experience difficulty demonstrating conformity. One of these areas, that of

potentially inappropriate screening criteria, has been previously identified to your staff. We have formulated a strategy that we believe may lead to successful resolution of that issue. This information is provided at Enclosure 3.

Additionally, to ensure that the USACE, acting in its Regulatory Program capacity, is not viewed as either a proponent or an opponent of those CALFED program elements that will need Department of the Army permits during program implementation, Sacramento District will not be able to actively participate in the selection of the preferred programmatic alternative. However, South Pacific Division will actively participate within CALFED in the selection of a preferred alternative in phase II.

We recognize that it may be difficult to assess which of these strategies is preferable to CALFED at this stage in CALFED's process, since there is at present uncertainty as to the nature of the decisions that CALFED will be making in phase II of its planning process. We encourage CALFED to continue to consult with EPA and the USACE on issues related to conformity with the Guidelines throughout the planning process, regardless of which strategy we agree to pursue. When CALFED is prepared to discuss which strategy it would prefer to pursue, we would suggest setting up a meeting with our respective staffs.

We hope that this information will be of assistance as the CALFED program moves through phase II. The point of contact for this issue within Sacramento District is Jim Monroe, telephone (916) 557-5266. The point of contact at Region IX is Thomas Yocom, telephone (415) 744-1975.



Dorothy F. Klasse
Colonel, Corps of Engineers
District Engineer



Alexis Strauss
Director, Water Division

Copies furnished w/enclosures:

Michael Spear, Regional Director, Region 1, U.S. Fish and
Wildlife Service, Eastside Federal Complex, 911 N.E. 11th
Avenue, Portland, Oregon, 97232-4181
Dr. William T. Hogarth, Acting Regional Administrator,
National Marine Fisheries Service, 501 W. Ocean Boulevard,
Suite 4200, Long Beach, California 90802-4213

Mr. Roger Patterson, Regional Director, U.S. Bureau of
Reclamation, 2800 Cottage Way, Sacramento, California 95825
Mr. Henry C. Wyman, Acting State Conservationist, 2121-C Second
Street, Suite 102, Davis, California 95616-5475
Mr. Doug Wheeler, Secretary for Resources, 1416 Ninth Street,
Room 1311, Sacramento, California 95814
Mr. Walter Pettit, Executive Director, State Water Resources
Control Board, 901 P Street, Sacramento, California 95814
Ms. Jacqueline Schafer, Director, Department of Fish and Game,
1416 Ninth Street, Room 1205, Sacramento, California 95814
Mr. Dave Kennedy, Director, Department of Water Resources,
1416 Ninth Street, Room 1115, Sacramento, California 95814